

This letter discusses basic principles of nexus. See 35 ILCS 105/1 et seq. and 35 ILCS 120/1 et seq. (This is a GIL.)

July 28, 2003

Dear Xxxxx:

This letter is in response to your letter dated and faxed to us on June 16, 2003. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

We appreciate the responsiveness that we have received from the Sales and Use Tax Division over the years in helping us resolve unusual taxpayer situations.

We represent a client ('Client 2') which is a subsidiary of a 'brick and mortar' retail business ('Client 1'). Client 2 has not collected Illinois sales and use tax based on its belief that since it has no physical presence in the state, that it has no sales or use tax collection obligation.

Client 1 is a corporation which is a 'bricks and mortar' retailer operating in a number of states. Client 1 pays state and federal income taxes and collects sales tax on sales in the individual states in which it does business. Client 2 makes retail sales through the internet only. Client 2 maintains separate accounts from Client 1.

We believe that the application of Illinois law to our unique set of facts supports a position that Client 2 is not subject to an Illinois sales and use tax collection obligation. Given that the U.S. Supreme Court held in Quill, 504 U.S. 298 (1992) that a more than de minimis physical presence is required in a state in order for a state to impose a sales and use tax collection obligation, our client believes that it is far from certain that the Courts will ultimately determine that it in fact has such collection obligation. Our client, however, wishes to bring certainty with respect to its obligations and proposes that it agree to voluntarily collect Illinois sales and use tax on a prospective basis. In return for our client voluntarily collecting sales and use tax on a prospective basis, we request that the Department agree that our client will have no obligation to remit tax, unless otherwise collected, for periods prior to the effective date of the agreement.

We trust that you and your staff have had an opportunity to review this matter that we will be able to reach an agreement which will constitute a mutually favorable resolution for both our client and the Department.

Please call me if you desire any additional information regarding this proposal. We look forward to working with you.

The Department does not generally make rulings regarding nexus in a General Information Letter. However, we hope that the following information regarding nexus and nexus created by the activities of an affiliate is useful.

Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An "Illinois Retailer" is one that either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set for the guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under current Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 310 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability, and the customer must remit the amount directly to the State.

In general, the imposition of the various local sales taxes in Illinois takes effect when "selling" occurs in a jurisdiction imposing a tax. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred. See 86 Ill. Adm. Code

270.115(b), enclosed. The tax rate is fixed by the location of the seller, not the delivery location. The fact that the item being sold is shipped from out-of-State or from another Illinois location is immaterial for purposes of local taxes if the sale occurs through order acceptance in an Illinois jurisdiction imposing a local tax. For these transactions the local tax will be incurred. If a purchase order is accepted outside the State, but the property being sold is located in an inventory of the retailer that is located in an Illinois jurisdiction that has imposed a local tax, then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes. In situations in which the retailer has nexus, but both the purchase order acceptance and the location of the property being purchased are outside of the State of Illinois, such sales would only be subject to the Illinois Use Tax at the rate of 6.25%.

Please note that Public Act 93-0025, effective June 20, 2003, added a new section to the Illinois statutes. 30 ILCS 500/50-12 provides that "(a) No person shall enter into a contract with a State agency under this Code unless the person and all affiliates of the person collect and remit Illinois Use Tax on all sales of tangible personal property into the State of Illinois in accordance with the provisions of the Illinois Use Tax Act regardless of whether the person or affiliate is a "retailer maintaining a place of business within this State" as defined in Section 2 of the Use Tax Act. For purposes of this Section, the term "affiliate" means any entity that (1) directly, indirectly, or constructively controls another entity, (2) is directly, indirectly, or constructively controlled by another entity, or (3) is subject to the control of a common entity. For purposes of this subsection (a), an entity controls another entity if it owns, directly or individually, more than 10% of the voting securities of that entity. As used in this subsection (a), the term "voting security" means a security that (1) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (2) is convertible into, or entitles the holder to receive upon its exercise, a security that confers such a right to vote. A general partnership interest is a voting security. (b) Every bid submitted and contract executed by the State shall contain a certification by the bidder or contractor that the bidder or contractor is not barred from bidding for or entering into a contract under subsection (a) of this Section and that the bidder or contractor acknowledges that the contracting State agency may declare the contract void if the certification completed pursuant to this subsection (b) is false."

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Martha P. Mote
Associate Counsel

MPM:msk
Enc.